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No. 86-2056

In the Supreme Court of the United States

OCTOBER TERM, 1986

LAURA B. MOSLEY,
Petitioner,

vs.

SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER, IN A CLAIM OF DISCRIMINATION IN PROMOTION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, THE "RELEVANT LABOR MARKET" IS THE EMPLOYER'S WHOLE WORK FORCE, WHERE PROMOTIONS ARE ROUTINELY MADE FROM THAT WORK FORCE.

II

IS IT PRIMA FACIE EVIDENCE OF A CHILLING EFFECT UPON FEMALE TEACHERS SEEKING TO BECOME ADMINISTRATORS IN A LARGE PUBLIC SCHOOL SYSTEM THAT FEMALES OUTNUMBER MALES TWO TO ONE IN THE TEACHING FORCE BUT MALE ADMINISTRATORS CONTROL THE SELECTION PROCESS FOR NEW ADMINISTRATORS AND TWICE AS MANY MALES AS FEMALES APPLY FOR ADMINISTRATIVE POSITIONS?

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PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties to the proceeding before the United States District Court for the Middle District of Florida and the United States Court of Appeals for the Eleventh Circuit.

Laura B. Mosley was the plaintiff before the United States District Court and appellant before the United States Court of Appeals for the Eleventh Circuit. The School Board of Pinellas County, Florida was the defendant in the United States District Court for the Middle District of Florida and the appellee in the United States Court of Appeals for the Eleventh Circuit.

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JURISDICTION

The judgment sought to be reviewed is final and dated January 21, 1987. Petitioner's petition for rehearing was denied March 30, 1987.

Jurisdiction in the United States District Court for the Middle District of Florida over both petitioner and respondent was pursuant to 42 USC §2000e-5(f)(3).

Jurisdiction of the United States Court of Appeals for the Eleventh Circuit was pursuant to 28 USC §1291.

Jurisdiction for this Court to review by certiorari is conferred by 28 USC §1254. However, since petitioner failed to show the decision of the United States Court of Appeals for the Eleventh Circuit conflicts with cases from other circuits, this case should be dismissed pursuant to Rule 17, United States Supreme Court.

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RESPONDENT'S BRIEF IN OPPOSITION

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Because the petitioner's Statement of the Case contains opinions, arguments and facts which are not found in the record, respondent feels compelled to provide the Court with a Statement of the Case which is based upon the record and does not contain opinions nor arguments.

At the end of the Statement of the Case, respondent will point out those areas where petitioner has taken liberty with the facts or offered conclusions not supported by the evidence. Since there may a factual dispute, respondent has requested that the record be transmitted to the Court so that where the facts appear to be in conflict, comparison can be made to the transcript.

I

STATEMENT OF THE CASE

In 1973, Laura B. Mosley was first employed as a teacher by the Pinellas County School Board. She was promoted to dean of students in February 1974 and served in that position in two different high schools until December 1979.

In the school year 1979/80, the construction of Countryside High School in northern Pinellas County was nearing completion. When completed, the school would need administrators and faculty. Two assistant principal positions were available at the administrative level. One position was entitled "administration" and the other "curriculum." In order to be considered for the assistant principal position, applicants were requested to meet the School Board's minimum qualifications by holding a state certificate in "administration and supervision." This requirement had to be completed by the time the applicant would assume the administrative position which was scheduled to begin August 1979.

In October 1978, along with 65 other educators, Ms. Mosley filed an application for the assistant principal position. Ms. Mosley indicated a preference for the "administration" position only.

Former Superintendent of Schools, Dr. Gus Sakkis, had promulgated a document entitled "The Recruitment and Placement of Administrative and Supervisory Personnel." This paper, as amended by his executive committee in the winter of 1978, described by position, *not gender*, a "screening committee" (hereinafter the committee), who would interview

applicants for various administrative positions which would become available in the school system, including the position which was the subject of this litigation. The committee was comprised of an employee of the personnel department (Mr. Hudson), the area superintendent (Dr. Whitted), the principal of Countryside High School (Mr. Williamson) and others chosen by these three. The committee then chose a middle school principal (Mr. Howie), an assistant principal (Mr. Wise), the Director of Equal Employment Opportunity (Mrs. Cooper) and the chairman of a school advisory committee (Mrs. Hole) to serve on the committee. The principal and assistant principal were selected to serve because they represented schools which "fed" students to the new high school.

The committee reviewed the 66 applications on file and determined that 29 persons were qualified to be interviewed. All of the members of the committee, except Adele Cooper met with the 29 qualified applicants. Mrs. Cooper was unable to be present during the interviews because she had a concurrent commitment to interview a principal at another school. Of the 29 educators interviewed, 18 were white males, three were black males, five were white females and three were black females.

On October 10th and 11th, 1978, the committee met with the qualified candidates and asked each one specific questions which had been printed on an interview form. During the interview process, the committee was very careful not to discuss the relative merits of any of the candidates. Thereafter, the committee evaluated the personal data and responses given by the candidates. A scale of 1-5 printed on the form was used to develop a numerical rating (1 was low, 5 was high). Each member of the committee then scored the candidates' answers. The district court found that the questions asked of the 29 applicants were not gender oriented and were job related.

All of the members of the committee, including Mrs. Hole, (the non-school employee member), placed Ms. Mosley from the lowest rank to the middle rank of those evaluated. Members of the committee ranked Ms. Mosley as follows: Mr. Hudson 14th; Dr. Whitted 28th; Mr. Williamson ranked Ms. Mosley in the 3rd lowest group; Mr. Vice 22nd; Mr. Howie ranked her below the middle; Mrs. Hole 12th.

After the interviewing process was completed, each committee member, without discussion, listed their top three candidates for both assistant principal positions. These names were placed on a blackboard. Then the committee members discussed the merits of the top candidates with the intent to

recommend the names of the finalists for each assistant principal position to the new high school principal. The three top finalists, in order of preference for the "administration" assistant principal position, were Messrs. Evans, Coutney and Crook. Mrs. Hole ranked Mr. Evans third, which was higher than any female applicant. From this list, the principal made his recommendation to the area superintendent who in turn made his recommendation to the Superintendent of Schools who is charged by law to recommend employment of personnel to the School Board [§230.33(7)(a), Fla. Stat.]. The School Board is required to accept his recommendation unless the nomination is rejected for good cause [§230.23(a), Fla. Stat.].

Ms. Mosley's initial claim of discrimination filed with the EEOC and the district court was partly based on the allegation that the successful candidate for the position of assistant principal was formerly associated with Mr. Williamson, the principal of the new high school. She also alleged that Mr. Evans had been preselected prior to the interview process. Such rumors are usually present during the selection process for administrative positions in the school system. However, no evidence was produced by Ms. Mosley to support her claim of preselection. She then compared her qualifications with those of Mr. Evans'. Both were certified in "administration and supervision" within the time limits required by the administration policy. Ms. Mosley was a dean two years longer than Mr. Evans, but he was a teacher in the system ten years longer than Ms. Mosley.

Ms. Mosley also offered statistical data showing the school system had approximately three times as many females as males employed in "teaching and administrative" (combined) positions from the school year 1978/79 through 1984/85 (App. 1). Also, in 1984/85 according to the evidence, two-thirds of the "basic administrators" employed by the School Board were males (App. 2). Petitioner excludes blue and white collar workers from her statistics which would drastically change the 3 females to 1 male ratio which she uses to compare the "teaching and administrative" work force to the administrative work force. But the petitioner presented figures that showed that about 68% of the school administrative positions were held by males in 1984/85 which she claims is evidence of discrimination in promotion. She compares that figure (68% male) to the percentage of females (67%) holding both "teaching and administrative" positions. This, petitioner describes in the petition, as the employer's "whole work force." However, Adele Cooper, a black female, testified that statistical evidence using the petitioner's example

of a "whole work force" comprised of only "teachers and administrators" was irrelevant and inappropriate since only those who were properly *certified* in "administration and supervision" could be considered for the position of assistant principal. She further testified that the "relevant labor market" for the position of assistant principal would consist of persons who held a certificate in "administration and supervision" and who met the criteria established by the school district for a particular administrative position. She stated that the relevant labor market (the pool of employees who held a certificate in administration and supervision) consisted of 67% male and 33% female. She testified that this was about the same male (68%) to female (32%) ratio which held basic administrative positions in the school systems in 1984/85.

The ratio of females holding basic administrative positions has been steadily climbing since the 1978/79 school year through the time that the case was tried (1985). During that period, the percentage of females employed as "basic administrators" climbed from 16% to 32% (App. 2). The evidence also showed that the percentage of females employed as *assistant principals* jumped from 13% in 1978/79 to 51% in 1984/85 (App. 3).

The district court found that the statistics offered by the petitioner showing the alleged disparity failed to support her claim under either a disparate impact treatment or disparate impact case because the statistics did not take into account the fact that, in order to apply for an administrative position, the applicant was required to hold a state certificate in administration and supervision.

The district court also found that Ms. Mosley failed to meet her burden of persuading the court that the legitimate nondiscriminatory reasons proferred by the School Board for its employment decision (hiring Mr. Evans instead of Ms. Mosley) were merely pretextual under the criteria established in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 253 at 256 (1981). That case discusses how the burden of proof shifts from the plaintiff to the defendant then back to the plaintiff in employment discrimination cases.

Based upon the criteria established in *Burdine*, supra, the district court found that the individual members of the committee used nondiscriminatory job related questions and rated Ms. Mosley from the bottom of the 29 applicants to the middle of the group. The court also found that the majority of the candidates finished above Ms. Mosley with higher numerical scores. The

district court even observed that several females placed higher in the committee's rankings but did not file complaints of discrimination. The district court made the ultimate finding that Ms. Mosley failed to prove that the "composition of the committee or its deliberations were gender oriented," or that the decision in the "chain of the hiring process was based upon a discriminatory motive required by law." Ms. Mosley was required to persuade the district court that the School Board's proffered explanation concerning its employment decision was unworthy of credence. She did not.

After reviewing the record, the United States Court of Appeals for the Eleventh Circuit determined that the district court's findings were not "clearly erroneous" and affirmed the district court's decision. Thereafter, Ms. Mosley filed her Petition for Writ of Certiorari to the Supreme Court of the United States.

II

RESPONSE TO PETITIONER'S STATEMENT OF THE CASE

Certain conclusions or facts offered by the petitioner are not accurate or based on the record. For example, the conclusion that there has been "relatively few females employed in administrative positions" is met by the statistics provided in the respondent's Apps. 1, 2 and 3.

Petitioner makes the erroneous statement that from 1978 through 1984, the ratio of females who were appointed "basic administrators" was 16% and that this number remained "unchanged." However, the 1984/85 figures show that 32% of the basic administrators employed are females. The evidence shows that the percentage of females employed as *assistant principals* also *changed* dramatically from 13% to 51% from the 1978/79 school year until the 1984/85 school year (App. 3).

The petitioner also misstates as fact that she had four years experience as a dean while Mr. Evans, who was appointed assistant principal, had only *one year experience* as a dean. The court's findings of fact clearly indicate that Mr. Evans had two years experience as a dean and had been a teacher in the school system for ten years while Ms. Mosley had only been a teacher for one year prior to her appointment as a dean.

Dr. Gus Sakkis, who was Superintendent of Schools from 1973-81, testified that, prior to his instituting the screening committee system, educators were appointed to administrative positions based upon the "good ole boy" approach. He introduced the "screening committee system" to eliminate this seemingly unfair method of nomination ("good ole boy") for appointment of administrators. Although not perfect, the committee system worked very well from 1978 to 1985 because the percentage of females employed as "basic administrators" increased from 16% to 32%. During this time, the number of females employed in administrative positions climbed from 27 in 1978/79 to 50 in 1984/85 while the number of males employed in administrative positions declined from 143 in 1978/79 to 107 in 1984/85. So, petitioner's conclusion that the screening committee system did not succeed is not supported by the testimony of Dr. Sakkis, nor the statistical evidence.

Petitioner's chauvinistic remark that the screening committee had a "token" female is certainly insulting to the non-school member of the committee. Mrs. Hole was a parent of a student and a school advisory committee chairman. She felt that she was serving her school community by being involved in the appointment of a high school administrator.

Petitioner also failed to note that there was another "token" female selected to serve on the screening committee, but Mrs. Cooper, the other "token" female, was unable to serve because of a prior commitment.

The petitioner also concludes that female teachers had little incentive to expend time or the money to obtain the professional training needed in order to obtain the necessary certificate to become an administrator. Although the petitioner claims that the Executive Director of the Pinellas County Classroom Teachers Association, a male (Jade Moore) testified to this effect, nothing is found in the record to support such a statement (see App. 4 for direct testimony of Jade Moore).

Petitioner continues her theme that a female's chances of success in being appointed as an administrator were less than those of a male. Petitioner reiterates that only a relatively few females would choose to commit the time and money necessary to become certified in administration and supervision because of the interview process. No one testified that females would not take additional college courses to become certified in administration and supervision because of the makeup of *a* particular screening committee. That committee's composition, even if male dominated, was not cast in concrete

as petitioner would have this Court believe. The composition of the interview or screening committees changes constantly.

The fact that the district court made no mention of a 6-2 (Mrs. Cooper was not in attendance) male to female makeup of the committee is not significant since there was no evidence that the makeup of the committee was gender oriented. The makeup of the committee had nothing to do with Ms. Mosley's poor showing during the interview. She was ranked from the lowest to about middle rank of the 29 applicants evaluated by the committee. Other female applicants were ranked higher than she, and did not complain about the interview process or the composition of the screening committee even though they did not succeed in getting the assistant principal appointment. Even Mrs. Hole ranked Ms. Mosley 12th.

The point petitioner makes about teachers taking general education courses and its effect on future advancement and promotion is unclear. General education courses lead to a four year degree which then generally qualifies the person for a teaching certificate. Thereafter, all teachers are in competition with each other (male and female) for teaching positions and positions such as department chairman. A duly certified teacher may seek to be employed as department chairman without taking any additional educational courses after obtaining a teaching certificate. It is sometimes helpful but not required. But in order to become an administrator, a teacher must be certified in "administration and supervision." To be selected as an administrator, a personal interview is part of the process. It is true Ms. Mosley's promotion depended upon successfully passing a subjective personal interview. However, there was no showing that the committee was biased or prejudiced and the petitioner did not get fair treatment. "Subjective interviews" have been upheld as not violative of Title VII. *Stones v. Los Angeles Community Colleges*, 796 F.2d 270 (9th Cir. 1986); *Danzl v. North St. Paul Inc. School District*, 706 F.2d 813 (8th Cir. 1983).

The petitioner again makes the conclusionary statement that there was a *gross statistical disparity* between the number of females who were employed as administrators, when compared to the general population of "teachers and administrators" in the school system. Both the trial court and the appellate court found that the case of *Hazelwood School District v. United States*, 433 U.S. 299 (1977) was applicable to the facts of this case. In that case, this Court held:

> When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value. 433 U.S. at 308, n. 13.

This Court approved the concept that employers may look to a group of qualified applicants to fill *particular jobs* rather than look to the general population of the community in order to determine whether the mix between male and female, black and white is statistically acceptable. Both the district and appellate courts determined that *Hazelwood* was applicable to the facts of this case because of the special qualifications or job skills needed to "fill a particular job."

Petitioner finally concludes that the district court made *no mention* of the so-called "chilling" effect that a male dominated screening committee would have on the future course of action taken by female educators. Whether a teacher takes additional college courses in order to be considered for administration positions sometime in the future and not knowing the composition of the selection committee was not answered by petitioner's evidence. In any event, the district court found that the composition of the screening committee was not gender oriented. If such composition had any significant effect on the interview process, the district court would have made a finding to that effect. Lastly, there is no way to determine several years in advance of taking courses and applying for an administrative position who (male or female) will be serving on a particular screening committee. One would surely need a "crystal ball" to predict that event. The "chilling effect" theory is therefore, at a minimum, very speculative.

Apparently, the appellate court was satisfied that the findings of fact covered the petitioner's "chilling effect" point when it said that:

> The plaintiff also failed to prove to the district court's reasonable satisfaction that past discriminatory practices of defendant had a chilling effect on female educators, discouraging them from becoming minimally qualified for promotion. *In the absence of such proof* the district court correctly held that the relevant labor market for the purpose of promotion was a group that met the formal qualifications for promotion. [Emphasis supplied.]

REASONS WHY WRIT OF CERTIORARI SHOULD NOT BE ISSUED.

I

WHETHER, IN A CLAIM OF DISCRIMINATION IN PROMOTION UNDER TITLE VII OF THE CIVIL ACTS RIGHT OF 1964, THE "RELEVANT LABOR MARKET" IS THE EMPLOYER'S WHOLE WORK FORCE, WHERE PROMOTIONS ARE ROUTINELY MADE FROM THAT WORK FORCE.

The way the question presented for review is framed ignores the special qualifications of the applicants who are being selected for administrative positions in the school system. Part of the issue presented by petitioner presumes that promotions are made *routinely* from the employer's work force. There is no evidence in record to support that conclusion. For example, a bus driver, would not be promoted to a teacher, or a cafeteria worker promoted to assistant principal of a school. Promotion to a "higher position" in a school system is a little more complicated than the way petitioner frames the issue.

The question presented for review should be: Whether in a Title VII discrimination case, where special qualifications are required for "promotion" or employment, should the "relevant labor market" be the employer's whole work force or a "labor pool" which is composed of those having special job skills or special qualifications which would include "outside qualified personnel" when being considered for promotion or employment. This question is answered by the case of *Hazelwood School District v. United States*, 433 U.S. 299 (1977) which held that:

> When special qualifications are required to *fill particular jobs, comparisons to the general population* (rather than a smaller group of individuals who possess the necessary qualifications) may have little probative value. 433 U.S. at 308. n.13. [Emphasis supplied.]

Petitioner argues that this Court has never addressed the problem as to what proof of discrimination is required in a *promotion* case as distinguished

from a hiring case. Although *Hazelwood* dealt with statistics in a hiring context, the principal of law cited above is not limited to just a hiring case. The Court did not make that distinction when it said "when special qualifications are required to *fill particular jobs*," comparisons for statistical purposes to the general population in the surrounding community may be irrelevant, when special qualifications are required to fill a particular job.

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), discusses what is expected statistically when an employer hires employees from minority groups from an areawide community. In that case, this Court held:

> . . . it is ordinarily to be expected that nondiscriminatory *hiring* practices will in time result in a work force more or less representative of the composition of the community from which employees are hired. [Emphasis supplied.]

Teamsters is a *hiring* case, but, petitioner cites *Teamsters* as being authority for the proposition that the same result would be expected in a *promotion* case, that is, an employer's supervisory work force would be more or less representative of the employer's whole work force unless discriminatory practices were involved. Instead of comparing the percentage of minority supervisory personnel to the "community as a whole" which is the "comparable" element in *Teamsters*, the comparable must be made to the qualified relevant labor market. *Davis v. Califano*, 613 F.2d 957, 963 (DC Cir. 1980).

Petitioner argues the holding in *Teamsters* (only) should be applied to the instant case, so that the comparison to be made to determine whether discrimination is taking place is based upon the employer's whole work force and not the *qualified* relevant labor market. *Teamsters* does not stand for that proposition at all. But petitioner criticizes the lower courts for applying the *Hazelwood* principal to the facts of this case, saying that *Hazelwood* should be distinguished from the instant case because it invokes *hiring* minorities and not their *promotion*. *Teamsters* does not make that fine distinction, nor does there seem to be any precedent for such distinction nor any reason to do so.

The holding in *Teamsters* makes sense because the comparison between the percentage of Negroes in the employer's work force and the percentage of Negroes in the general areawide population was highly probative of discrimination because the *job skills* there involved - "the ability to drive a truck - is one that many people possess." A gross disparity between the percentage of blacks employed and the percentage of blacks in the area wide community was probative of discrimination. But when special job skills or special qualifications are required, comparison to the community or employer's whole work force becomes irrelevant. The proper comparison whether discrimination is taking place should be based upon the qualified relevant labor market of person with like skills or special qualifications and not the employer's whole work force or the community at large, *Davis v. Califano*, supra.

After critizing the lower courts in applying *Hazelwood* to facts of this case, petitioner ironically argues that *Teamsters*, a hiring case is applicable while *Hazelwood* also a *hiring* case should not be applied.

True, *Hazelwood* involves hiring, but the language in footnote 13 was not limited to that context. *Teamsters* recognized that evidence of *long standing* and *gross disparity* between the composition of the employer's work force and that of the areawide general population from which employees are generally hired, may be significant in determining whether there has been a discriminatory hiring practice when the employer's "work force" does not reflect the percentage that in time would naturally reflect the minority population of the community from which the hiring took place. That is true when the case involves "truck drivers" but is not necessarily true in those cases where *special qualifications* or *job skills* by are needed by an employer. *Davis v. Califano*, supra held that:

> The proper comparison is between the composition of the relevant work force and the qualified population in the relevant labor market . . . For example, if a doctorate was necessary for an individual to be eligible for a position in the upper grade levels at NIH or NHLBI, then statistics on the relevant labor market would have to be so limited. 613 F.2d at 964, 965.

Petitioner's statement that promotions usually come from the employer's own work force and not the outside labor market is not based upon any evidence in this record. In the education world, selection of high ranking administrators (the Superintendent of Schools for example) are usually made from outside a school system through nationwide searches. So the petitioner's generalization regarding promotion from the employer's work force is based upon pure speculation, and not the evidence. From that statement petitioner then concludes that the employer controls all stages of promotion.

If the employer has control of all stages of the promotion process through which an employee must pass to qualify for promotion, discrimination may follow, if the evidence shows the percentage of minorities promoted from the qualified relevant labor market does not reflect that same minority percentage in the employer's relevant work force, and *"business necessity"* was not involved to change the expected percentage.

Unfortunately, petitioner offered no evidence to support such theory. Petitioner did not get the right answer to the question she posed to the Director of Equal Employment Opportunity when she asked, "Why are females not qualifying themselves for administrative positions?" Adele Cooper said, "It seems to me that more men are interested in upward mobility rather than females." The affirmative action officer also testified that the selection process (so called male dominated committee) would not discourage females (teachers) from seeking to become minimally qualified for advancement to administrative positions.

If the employer is not controlling how employees enter a qualified pool from which promotion is made, or if it selects qualified personnel from outside its own work force (school systems routinely do this), then it is immaterial whether those who are "promoted" and became part of the relevant work force reflect the ratio of minorities to non-minorities in the employers whole work force.

Petitioner next argues that *Davis v. Califano*, supra, *Stastny v. Southern Bell T & T Co.*, 628 F.2d 267 (4th Cir. 1980) and *Griffin v. Carlin*, 755 F.2d 1516 (11th Cir. 1985) hold that the employer's whole work force is the "relevant labor market" upon which discrimination comparisons should be

based. But those cases do not conclude that the "relevant labor market" as the term is defined in *Hazelwood*, is the employer's whole work force. To a certain extent, the facts and statistics in these cases deal with promotions from within the employer's work force, and except for Davis do not involve promotion based upon any *special qualifications* or *job skills*.

Davis v. Califano, supra, holds that the proper comparison is between the composition of relevant work force and the *qualified* population in the relevant labor market, and not what petitioner argues: that the relevant labor market to be used for comparison purposes is the "employer's whole work force" without regard to qualifications for a particular job. 613 F.2d at 963, 964.

As in *Davis v. Califano*, supra, in order to be considered for the position of assistant principal, one had to have *special qualifications*. Therefore, the qualified relevant labor market in the instant case included only those who had a certificate in "administration and supervision" and not just teachers, bus drivers, cafeteria workers or school board attornies. Those employees would not have the relevant job skills or educational training to become an assistant principal. In any event, the point is moot because Ms. Mosley had the proper qualification and was part of the qualified relevant labor market from which the assistant principal would be hired. Respondent does know why she argues that the relevant labor market from which she might be hired is not *relevant*, except she doesn't like the ratio of males (68%) to females (32%) and would rather use another group [the whole labor market] because it had a ratio of 67% female teachers to 33% male teachers in order to make a statistical prima facie case. *Davis v. Califano*, supra, Id. at 962. If the relevant labor market for promotion to assistant principal is not those holding a state certificate in "administration and supervision" for comparison purposes, what is?

Assume that the statistical comparison offered by petitioner was adequate to make out a "prima facie" case when she showed a "gross statistical disparity between females and males in administrative positions when compared to the "whole teaching force." In any event, the district and appellate courts held that *Hazelwood* was applicable to the facts of this case because as the *Davis* court said:

> An employer may defeat . . . recovery sustaining its burden of proving the plaintiffs statistical proof of . . . discrimination is *inaccurate* or *insignificant*, or that the employee was denied employment benefit for lawful reasons. Id. at 962. [Emphasis supplied].

In answer to petitioners request to this Court as to what constitutes the "relevant labor market" in a promotion case, this Court should refer the petitioner to note 13 in *Hazelwood* as the legal principal.

This Court should dismiss the Petition for Writ of Certiorari since the cases cited by petitioner do not "conflict with the decision" of the United States Court of Appeals for the Eleventh Circuit. Under Rule 17 of the United States Supreme Court Rules this Court will review a Petition for Writ of Certiorari in those cases where "a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter." Petitioner has failed to describe the conflict between *Davis v. Califano*, *Stastny v. Southern Bell T & T Co.* and *Griffin v. Carlin*, supra, with the decision rendered by the United States Court of Appeals for the Eleventh Circuit in the instant case.

II

> IS IT PRIMA FACIE EVIDENCE OF A CHILLING EFFECT UPON FEMALE TEACHERS SEEKING TO BECOME ADMINISTRATORS IN A LARGE PUBLIC SCHOOL SYSTEM THAT FEMALES OUTNUMBER MALES TWO TO ONE IN THE TEACHING FORCE BUT MALE ADMINISTRATORS CONTROL THE SELECTION PROCESS FOR NEW ADMINISTRATORS AND TWICE AS MANY MALES AS FEMALES APPLY FOR ADMINISTRATIVE POSITIONS?

Petitioner's "chilling effect" theory is based upon an alleged discriminatory practice used by the respondent when it employed a "male dominated" interview or screening committee to assist the Superintendent of Schools in making a recommendation for appointment to administrative positions from a group of qualified administrative candidates. This "male dominate" screening committee, according to petitioner's theory,

discourages females from taking necessary training and educational courses in order to be certified in "administration and supervision" which is necessary to be placed in the *qualified* relevant labor market.

As part of her argument, petitioner suggests that the United States Court of Appeals for the Eleventh Circuit, in order to rationalize its failure to follow its own precedent in *Griffin v. Carlin*, supra, introduced the idea of "chilling effect," that is, whether a male dominated screening committee could, in some way in the future, discourage females from taking additional courses to become certified in "administration and supervision" which is necessary in order to be promoted to administrative positions from the teaching ranks. Her statement is not accurate. It was petitioner herself who introduced the so called "chilling effect" issue at the trial. She asked the affirmative action officer if a male dominated "screening committee" could, in fact, have a "chilling effect" on females. Petitioner did not get the expected response, then dropped the issue and no further evidence was produced on that subject. She might have elicited testimony from some female teachers indicating their reluctance to seek advancement through additional college courses because of a fear that a male dominated "screening committee" would discriminate against them. But this was not the case. The only evidence offered by petitioner possibly related to this "chilling effect" theory were charts (Apps. 1, 2, 3) showing male/female mix in "basic administrative" positions and "assistant principal" positions when compared to a "work force" composed of only "teachers and administrators." The employer's whole work force was not used for statistical purposes by the petitioner. But as was held in *Davis v. Califano*, supra, the proper comparison to show discrimination, if any, is between the composition of the relevant labor force (administrators) and the *qualified* relevant labor market (those holding a certificate in administration and supervision). Ms. Mosley applied for the position of assistant principal because she was qualified (she had the requisite certificate) for the position and thus a member of the qualified relevant labor market.

In any event, petitioner does not cite authority which supports the notion that a so-called male dominated screening committee acting on behalf of the Superintendent to assist him by making nominations for appointments for advancement in the school system has a "chilling effect" upon females who might otherwise become minimally qualified for promotion.

Petitioner argues that this Court has said that in a hiring context, proof of a failure of minority members *to apply for a job* is also proof of a "chilling effect" citing *Teamsters* for that legal principal. *Teamsters* was not confronted with the "chilling effect" theory as suggested by the petitioner. That part of *Teamsters* which is quoted by petitioner for the "chilling effect" theory is totally unrelated to the facts of this case. In *Teamsters*, the Court held that an incumbent employee's failure *to apply* for a job did not bar an award of retroactive seniority. This Court held that individual minority non-applicants for jobs must be afforded the opportunity to undertake the difficult task of proving that they should be treated as applicants where there was evidence of discrimination against minorities. The minority non-applicants were entitled to relief under Title VII. Ms. Mosley was an *applicant* for the position of assistant principal, therefore, reference to *Teamsters* which dealt with non-applicants, who may have been the subject to discrimination has no bearing on the instant case.

Griggs v. Duke Power Company, 401 U.S. 434 (1971) and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), cited by petitioner, have no application to the facts of this case either.

Albemarle Paper Co. v. Moody, supra, held that pursuant to the holding in *Griggs v. Duke Power Co.*, supra, Title VII forbids the use of employment (written or personality) tests that have discriminatory effect, unless the employer meets the *burden* of showing that the tests are job related. This burden arises only after the complaining party has made out a prima facie case of discrimination, i.e., has shown that the *tests* in question select applicants for hire or promotion in a racial pattern significantly different from the "relevant labor market." If the employer proves that *tests* are job related, the burden shifts to the complaining party to show that the *tests* or *selection device (personality profiles, etc.) are used as a pretext for discrimination*. Obviously, the *tests* referred to in *Albemarle* were not used in the instant case, and if the certification requirement could be considered a "test or selection device," petitioner has failed to show to the lower courts' satisfaction that the respondent was using the "certification" requirement for promotion to assistant principal as a pretext for discrimination.

Griggs is readily distinguishable from the instant case because Ms. Mosley has not proved any facially neutral policy or practice which results in dis-

crimination. In *Griggs*, the employer required employees to have a high school diploma or pass a standardized intelligent test for employment or for promotion to other jobs. These standardized tests used by the company were not intended to measure the ability to learn or perform a particular job or category of jobs. Thus, the standards imposed by the company (the high school diploma and intelligence test) were not specifically related to job performance. Both of these requirements operated to disqualify black applicants at a substantially higher rate than white applicants. Griggs wanted a job which was formerly filled by white employees pursuant to his company's long standing pre-Title VII practice of openly discriminating against blacks by giving preference to whites in hiring and assigning white employees to a particular plant. Complying with Title VII, the company abandoned its policy of restricting blacks to the lowest departmental classifications and instituted the high school diploma and test requirements.

The district court found that there was no showing of racial purpose or invidious intent by the adoption of the test requirements and that the standards had been fairly applied to both white and blacks. The court of appeals held that the district court was correct in its conclusion that there was no showing of racial purpose or invidious intent in the adoption of a high school diploma requirement or general intelligence test and that these standards had been applied fairly to whites and blacks alike. It held that, in absence of a discriminatory purpose, use of such requirements was permitted by the Civil Rights Act of 1964. In so doing, the court appeals rejected the claimant's argument that because these two requirements operated to render ineligible a markedly disproportionate number of Negroes, they were unlawful Under Title VII unless shown to be job related.

This Court reversed and held that facially neutral practices that have a disproportionate impact on minorities and are unrelated to job capability, regardless of good intent or discriminatory motives, may violate Title VII. This Court said it was not error for the lower court to examine the employer's intent but evidence of "good intent or absence of discriminatory intent" does redeem the employment procedure testing mechanisms that operate as "built-in head winds" to minority groups and are unrelated to measuring job capability.

In *Griggs*, the jobs sought by a minority group consisted of five categories of work, none of which required a high school diploma or passing of a subject intelligence test. The instant case involves the position of assistant principal for which the petitioner applied. This position requires a highly qualified person. In order to be qualified for this position, a college degree at both the bachelor's level and master's level is required and a certificate in administration and supervision. This certification requirement imposed by the school district involves the taking of additional college courses so that one will be prepared to be an administrator.

Petitioner admits in her brief that the "first step of the selection process" is a legitimate business objective and is related to job performance. However, to take the next step and argue that the evidence offered (that more males than females take the necessary college courses in order to be qualified to become an administrator because of the male dominated screening committee) is a "built-in head wind" under *Griggs* is not supported by any evidence in the record. Petitioner's theory is based upon pure speculation and conjecture.

Once having assumed that the "first step" is a "built-in head wind," petitioner then jumps to the conclusion that the interview process "predictably discourages females from undertaking the first step." Unfortunately, petitioner never proved this theory of her case nor offered any evidence to support that conclusion.

Finally, petitioner ultimately concludes that it is the *combination* of the subjective personal interview with the objective certification requirement which discourages females from taking the first step by satisfying this legitimate objective requirement (the certification process). But, petitioner never offered one shred of evidence to suggest that the interview process, in some way, predictably kept females from taking additional college courses and training in order to qualify to become an administrator, nor could she.

As suggested in respondent's Statement of the Case, a female employee would certainly need a "crystal ball" to determine, several years in advance of being qualified to become an administrator, who would be on the screening committee. Prior to being qualified for that position, a teacher would have

to take several years of college courses in order to be certified in administration and supervision. When a teacher begins to take educational courses to be certified in administration and supervision, this year's male dominated screening committee could be next year's female dominated committee. No one could know the future composition of a screening committee, much less who would be the superintendent of schools, the person charged by Florida law to make the nomination for appointment as an administrator.

Petitioner has failed to show, in any detail, how the cases cited in argument II, in any way, conflict with the decision of the United States Court of Appeals for the Eleventh Circuit in the instant case. Thus, the petition should be dismissed for failure to comply with Rule 17, United States Supreme Court Rules.

CONCLUSION

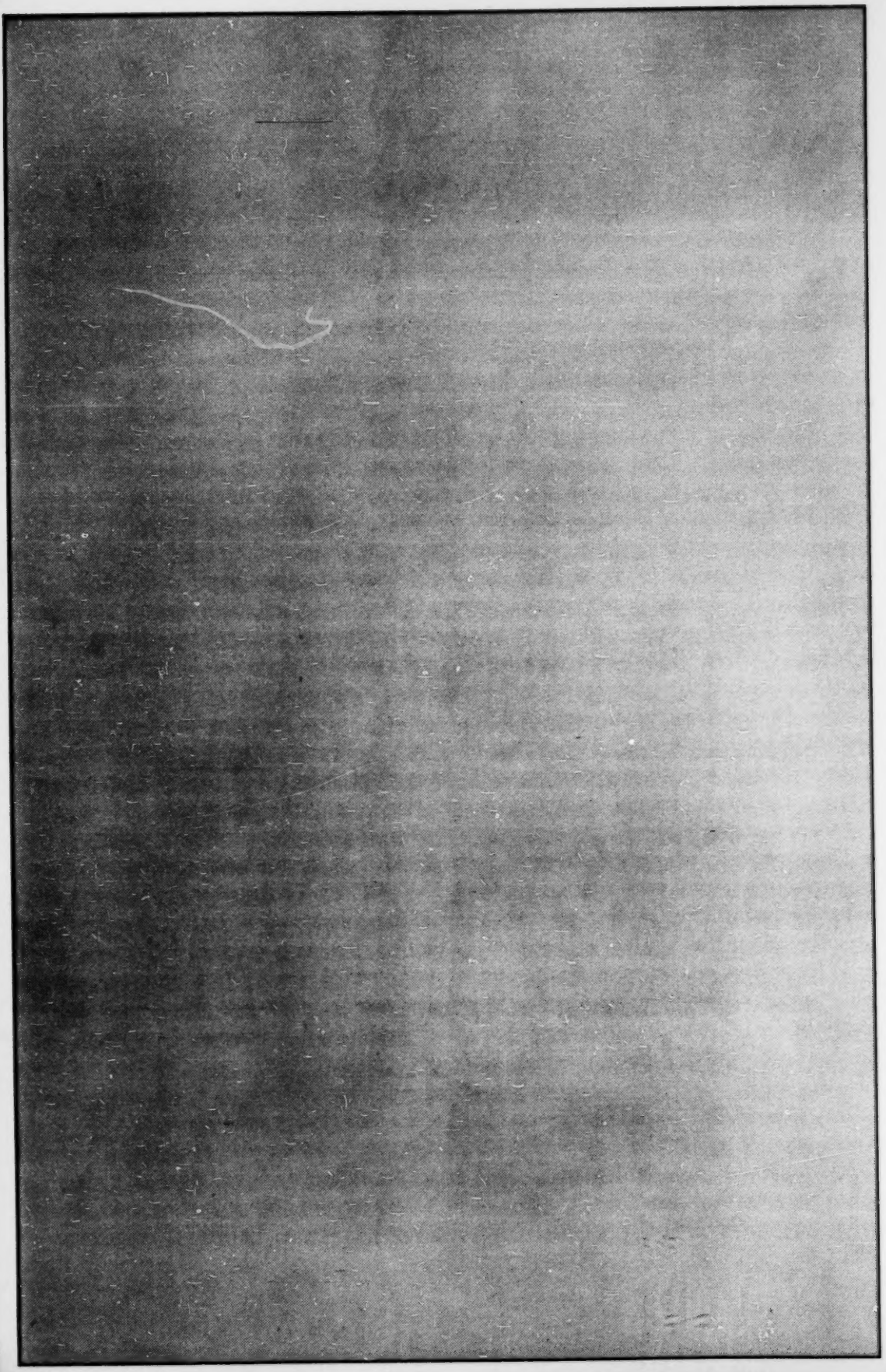
Since the petitioner has failed to cite any case which conflicts with the decision of the United States Court of Appeals for the Eleventh Circuit in the instant case, either under argument I or II of the Petitioner's Reasons Why the Petition for Writ of Certiorari Should be Granted, the Petition should be DISMISSED with costs and attorney's fees allowed to the respondent in the instant case.

Respectfully submitted,

B. EDWIN JOHNSON
(Counsel of Record)
P.O. Box 6374
Clearwater, Florida 34618
Counsel for Respondent

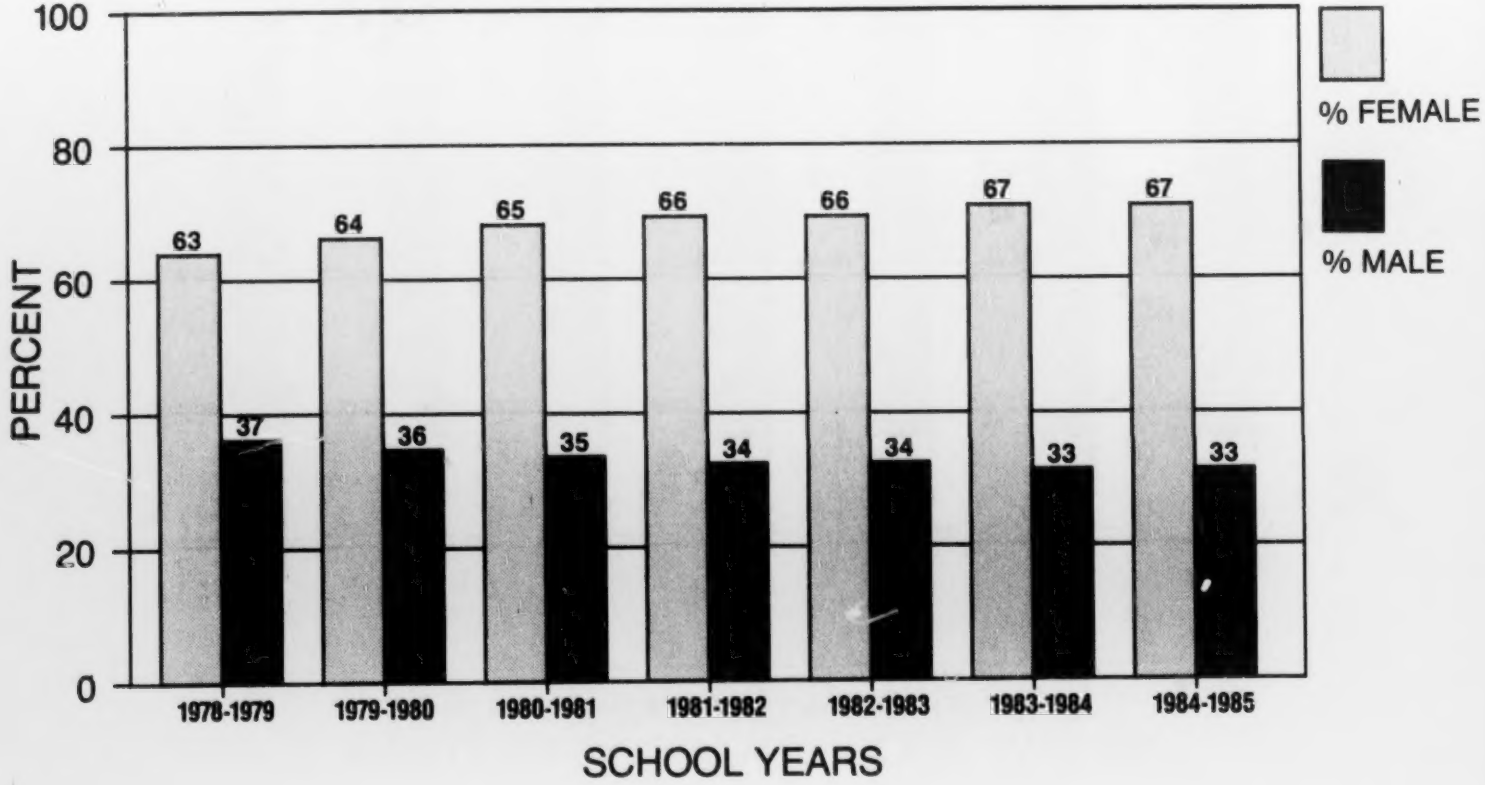
APPENDIX

BEST AVAILABLE COPY



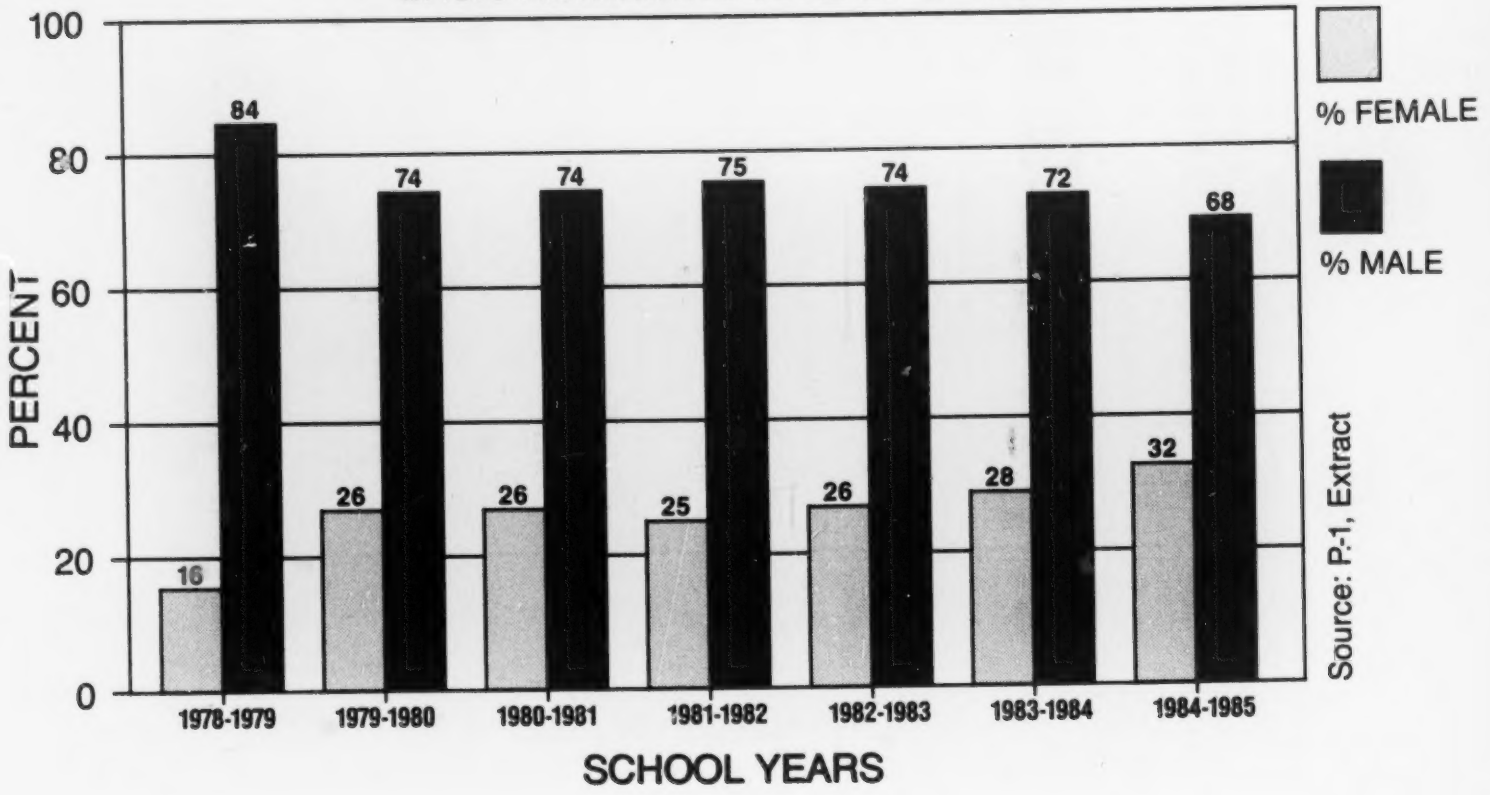
App. 1

PINELLAS COUNTY SCHOOL SYSTEM
TOTAL TEACHERS AND ADMINISTRATORS BY GENDER

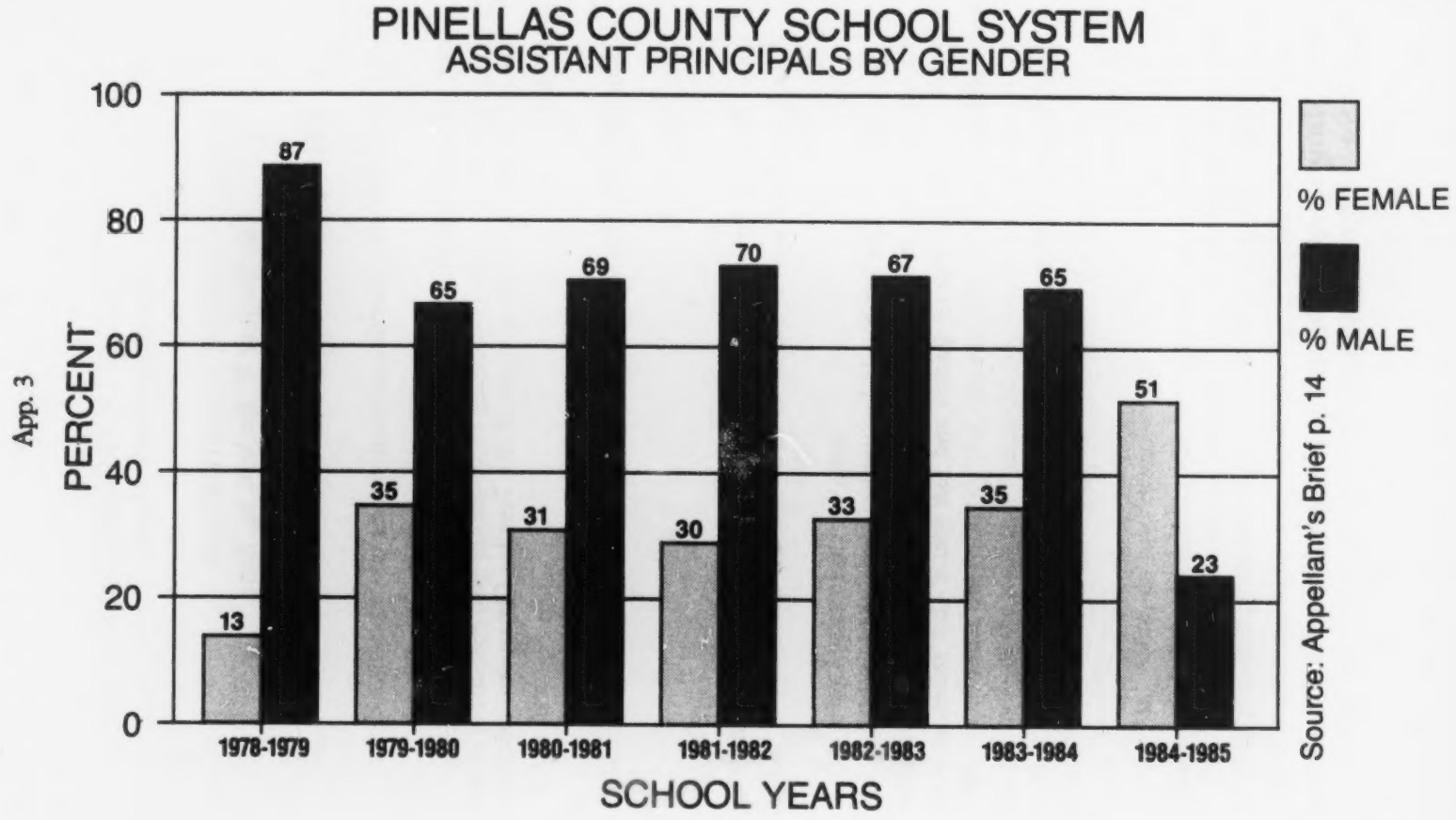


App. 2

PINELLAS COUNTY SCHOOL SYSTEM
BASIC ADMINISTRATORS BY GENDER



App. 3


PINELLAS COUNTY SCHOOL SYSTEM
ASSISTANT PRINCIPALS BY GENDER
PERCENT
100
80
60
40
20
0
87
65
69
70
67
65
51
35
31
30
33
35
23
13
1978-1979
1979-1980
1980-1981
1981-1982
1982-1983
1983-1984
1984-1985
SCHOOL YEARS
% FEMALE
% MALE
Source: Appellant's Brief p. 14

TRANSCRIPT OF PROCEEDINGS
(Testimony of Jade Moore)

DIRECT EXAMINATION
By Gardner W. Beckett, Jr., Esq.

Q. Where do you reside, Mr. Moore?

A. In Clearwater, Florida.

Q. And what is your occupation?

A. I'm the executive director of the Pinellas Classroom Teachers' Association.

Q. And how long have you held that position?

A. Since 1974.

Q. Were you holding that position, and I assume you were, in 1978?

A. Yes.

Q. Plaintiff's Exhibit No. 11 has not been received in evidence, but I'm going to ask you to look at a news item which appears on January the 4th, 1979, in which you're quoted and ask you if that refreshes your recollection.

Q. Do you recall the case of Laura Mosley?

A. Yes sir.

Q. Do you recall whether or not any publicity attended that case?

A. Yes.

Q. Do you recall whether or not that case was the subject of consideration by the Teachers' Union?

A. Yes, it was.

Q. Was Laura Mosley a member of the Teachers' Union?

A. No.

Q. Why was that?

A. Because she was an administrator.

Q. Was there general publicity in the newspapers and otherwise at that time as to concern over the selection methods used by the School Board?

A. Yes.

Q. Did the Pinellas County Teachers' Organization take a position on that?

A. Yes.

Q. What was the — what action was taken? Give us the details out of it.

A. May I refer to the minutes?

Q. I believe you may.

A. Following the publicity that was attended to by the case that was brought by — or the issue that was raised by Mrs. Mosley, the Association faculty representative counsel received a recommended motion from our Women's Concerns Committee, and if I can find it I'll read it to you.

Q. Mr. Moore, do you remember the question that I asked?

A. The Association faculty representatives, which are the people that represent us in each of the buildings in the County, meet monthly and they undertook a motion which was supplied by our Women's Concern caucus that expressed our concern with hiring of minorities and women in the School System and asked us to advise the Board in central administration to

encourage the hiring of additional women and minorities, and that was adopted by that group.

Q. And approximately when did this take place?

A. In January of 1979.

Q. And how long, if you know, had this concern been expressed by your group?

A. This was the first official action that was addressed to the School System.

Q. How long had your group been aware of this problem as they saw it?

A. In terms of any official record this is the first evidence that I found.

Q. For the purpose of refreshing your recollection, I would like to quote to you a statement allegedly made by you in the January 4th, 1979, issue of the St. Petersburg Times. Among other things, the statement says, "Union Executive Director, Jade Moore, said that the Teachers' Organization has complained of discriminatory hiring and promotion policies since 1967."

A. Okay.

Q. Is that correct?

A. If I said it, then yes sir.

Q. Thank you. I just wanted to establish that this was not a single incident as far as you —

A. No sir, it was the first time that the Associations' governments had undertaken a specific complaint of that nature to my recollection, but as far as concerns over that I think they'd been going on since the organization was formed.

MR. BECKETT: And I have no further questions, Mr. Moore.